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Court Vacates "Final Rule" Regarding CERCLA and EPCRA Reporting Requirements

The U.S. Court of Appeals for the District of Columbia Circuit recently vacated a 2008 Environmental Protection Agency (EPA) rule that exempted farms from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) reporting requirements for air releases from animal waste. *Waterkeeper Alliance v. Environmental Protection Agency* 853 F. 3d 527 (2017). In December 2007, the EPA proposed exempting farms from CERCLA and EPCRA reporting of air releases from animal waste. The impetus for proposal was that the EPA could not "foresee a situation where it would take any future response action as a result of notifications of air releases from animal waste as on-going releases makes an emergency response unnecessary, impractical, and unlikely." Public comments on the proposal sought information about emissions from the largest farms—Concentrated Animal Feeding Operation (CAFO). CAFOs are farms that confine a relatively large number of animals, usually exceeding 1,000. The "final rule" requires CAFOs to continue reporting air emissions under EPCRA, but not under CERCLA.

Environmental and agricultural groups challenged the "final rule". The environmentalists, including the Waterkeeper Alliance, argue that CERCLA and EPCRA don't permit the EPA to grant reporting exemptions, but instead require reports of any and all releases over the reportable quantity. The "final rule" is arbitrary, according to Waterkeeper, because it treats air releases from animal waste at farms more favorably than those from other sources or locations.

The Court of Appeal states that they reviewed the "final rule" for reasonableness under the standard of *Chevron USA, Inc. v. NRDC, Inc.* (within its domain, a reasonable agency interpretation prevails and if Congress has directly spoken to an issue then an agency interpretation contradicting what Congress has said would be unreasonable). The court concluded that the concerns for efficiency and minimizing the burdens on government agencies do not give the EPA carte blanche to ignore the statute whenever it decides the reporting requirements are not worth the trouble.

As to the EPA's argument that there was an absence of regulatory benefit, the court stated that the EPA argued that the animal-waste reports are unnecessary because, *in most cases*, a federal response is impractical and unlikely. The court stated that this qualification suggests that at least some circumstances would call for a reporting requirement. The court cites to commenters in the rulemaking who put before the EPA a good deal of information suggesting scenarios where the reporting requirements could be quite helpful in fulfilling the statutes' goals e.g., when manure pits are agitated for

pumping, hydrogen sulfide, methane, and ammonia are released from the manure and can reach toxic levels.

In addition, the commenters to the rule-making pointed to the role of information in enabling responses by local officials. The court agreed that the "final rule" prevents local, state, and federal emergency responders from having critical information about potentially dangerous releases and limits the ability of federal or state authorities to take action through investigations, clean-up, or issuing abatement orders. In conclusion, the court stated that the EPA's action cannot be justified as a reasonable interpretation of any statutory ambiguity or implementation of a *de minimis* exception and the court vacated the "final rule".